No. 508

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

GEORGE W. REED, Administrator with the will annexed of the Estate of Catherine M. Garcelon, deceased, and JAMES P. MERRITT,

Appellants,

vs.

JOHN A. STANLY, Trustee, etc., et al.,

Appellees.

The Appellants' Reply Brief.

RODGERS, PATERSON & SLACK,

Counsel for Appellants.

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Appellees.

THE APPELLANTS' REPLY BRIEF.

I.

The Appellants' Bill of Review Was Filed Within Due Time.

The Shortest Possible Limitation is Two Years After the Entry of the Decree to be Reviewed.

1. The Erroneous Limitations Fixed by the Court Below.

In rendering the decree appealed from, the ground of the ruling of the Circuit Court was that the

bill of review must be filed within the term of the Circuit Court at which the decree sought to be reviewed was made, or else that a certificate of the question of jurisdiction must have been granted during such term, so that the right of appeal to the Supreme Court within two years after the entry of the decree shall exist, thus making a shifting time within which bills of review must be filed.

The reasons why a bill of review cannot be filed during the term at which the decree sought to be reviewed was made, have been sufficiently presented in our opening brief. A certificate as to jurisdiction is required in certain cases, as also pointed out in our opening brief, in order that the labors of the Supreme Court may be diminished by the elimination of all other questions. The granting of the certificate has nothing to do with bills of review, and ought in no way to control the time within which such bills may be filed. The defeated party may not desire to appeal, but may be satisfied to rely upon a bill of review,—" may well have concluded " that a bill of review was preferable", *Esminger* vs. *Powers*, 108 U. S. 303—and if he is so satisfied can it be said that he must nevertheless see to it that a certificate as to jurisdiction, required for a particular object relating to the Supreme Court only, must [redacted] be granted?

Again, in a case where no other question than that of jurisdiction was litigated, no certificate of the question of jurisdiction is requisite even

Again, it is settled that the limiting of the time within which a bill of review may be filed rests on the principle of requiring the bill to be filed without laches (*Thomas* vs. *Harvie's Heirs*, 10 Wheat. 149). But if the time for filing the bill of review be limited only by the end of the term at which the decree sought to be reviewed was made, then the bill of review would have to be filed within a shifting period, which might be twenty days in one case, and one day in another case, and in another case on the very day on which the decree sought to be reviewed is made—and all this would be independent of the bulk of or complexity of the record to be reviewed. Is it not manifest that such a limiting of the time could not rest upon any such principle as that of preventing laches?

assume also the inconsistent position that the limit was six months after the entry of the decree sought to be reviewed. This limit of six months they adopt solely because it is the limit within which an appeal (upon other grounds than jurisdiction) may be taken to the Circuit Court of Appeals.

But an examination of this new and inconsistent ground of the appellees will disclose that it is absolutely untenable and indefensible, and will demonstrate that the shortest possible limitation is two years after the entry of the decree sought to be reviewed.

The Rule to be Applied.

It is conceded—for it cannot be denied—that there is a minimum limit of time fixed by law within which a party is of right entitled to file a bill of review for error in law apparent upon the face of a decree, and that the following language of the Supreme Court in *Ensminger* vs. *Powers*, 108 U. S. 302, correctly states the rule namely:

> "A bill of review must ordinarily be brought
> "within the time limited by statute for taking an
> "appeal from the decree sought to be reviewed."

The minimum limit so fixed, is of course strictly subject to that requisite stated by Blackstone in his definition of law, as follows:

> "And first, it is a *rule*, not a transient, sudden
> "order from a superior to or concerning a particu-
> "lar person; but something *permanent*, *uniform*
> "and *universal*.

Let us consider the cases in a United States Circuit Court "in which the jurisdiction of the Court is in issue", and ask to what court they may be appealed and within what time.

(1.) One class of such cases is where the only question is that of the jurisdiction of the Court. Such was the case of *Interior Construction Co.* vs. *Gibney*, 160 U. S. 219. Such a case cannot possibly be appealed to the Circuit Court of Appeals;—the only appeal that can be

had is to the Supreme Court of the United States. This is manifest from Sections 5 and 6 of the Act of March 3, 1891, and is expressly declared by the Supreme Court in *United States* vs. *Jahn*, 155 U. S., at p. 114. And the time allowed for taking the appeal is "within two years after the entry of such * decree" (§1008 Rev. Stats.)

And in such a case, if the want of jurisdiction appears upon the face of the decree, the remedy may be had by a bill of review.

Ketchum & Wf. vs. *Farmer's Loan & Trust Co.*, 4 McLean 1;
Miller vs. *Clark*, 52 Fed. 900;
Story Eq. Pl., §405;
King Bridge Co. vs. *Otoe Co.*, 120 U. S. 226;
Brown vs. *Keene*, 8 Pet. 115 (by Ch. J. Marshall.);
Ensminger vs. *Powers*, 108 U. S. 301–2, 303.

Now, in such a case, within what time would a party be entitled to file the bill of review? The answer can not be obscured by any analogy with the time limited for an appeal to the Circuit Court of Appeals, for the law authorizes no such appeal The time is that "limited by statute for taking an appeal from the "decree sought to be reviewed". In such a case, that time is "within two years after the entry of such "judgment, decree or order" (§1008 R. S.),—a conclusion so manifest that it can be neither evaded nor obscured.

(2.) Suppose, next, that the case is where the defendant chooses to make no other defense than to deny the jurisdiction of the Court, and to do this by demurrer only. The case would then stand precisely as if no other defence to the case existed. The only appeal that could possibly be had in the case would be to the Supreme Court of the United States (*United States* vs. *Jahn*, 155 U. S. 114). The appeal could be taken "within two years after the entry" of the decree (§1008 R. S.), and if the party should elect to seek his remedy by a bill of review, he would have the same time within which to file his bill of review. (*Ensminger* vs. *Powers*, 108 U. S. 302.)

(3.) Take, next, the class of cases precisely like that of *Bowdoin College* vs. *Merritt*, the decree in which is sought to be reviewed in the case here. Upon being brought into Court, the defendant first makes, by demurrer, the defense that the case is not within the jurisdiction of the Court, and, in every possible form, continues to make that defence even until the final decree. But, finding that the Court disregards his defence to the jurisdiction, he also endeavors, though in vain, to defend upon the merits of the case. But, as soon as the final decree against him is made, and from that time forward, perceiving that the case was clearly not within the jurisdiction of the Court, he chooses to seek his relief against it on that ground only,—he raises only his original objection,—he

complains and shows that the Court had at no time any jurisdiction to give judgment upon the merits of the case and that he therefore refuses to litigate the case any further upon the merits. To him, seeking relief solely on the fundamental ground that the case was not within the jurisdiction of the Court, the law gives the right to an appeal to the Supreme Court of the United States, and to that Court only. (*United States* vs. *Jahn*, 155 U. S. 114). The appeal could be taken "within two years after the entry" of the decree (§1008 R. S.), and if the party should conclude "that a bill of "review was preferable" (*Ensminger* vs. *Powers*, 108 U. S. 303) he would have the same time within which to file his bill of review. (*Ensminger* vs. *Powers*, 108 U. S. 302).

The appellees seek to obscure all this by suggesting by way of shifting the ground, that, even though the suit was not within the jurisdiction of the Circuit Court, the defendant should litigate the merits of the case and should continue to do so even after the final decree; that if he should so continue to litigate the merits of the case, he might appeal on the merits to the Circuit Court of Appeals, that such an appeal could be taken only within six months after the entry of the decree, that by means of it he might have a review of the want of jurisdiction, and that this proves that he cannot file in the Circuit Court a bill of review upon

the ground of error in law apparent upon the face of the decree, (such error being that the suit was not within the jurisdiction of the Court) except within six months after the entry of the decree sought to be reviewed.

To this suggestion of the appellees, seeking a shifting of the ground, there are two answers each of which is by itself conclusive.

(1.) Where a case is not within the jurisdiction of the Circuit Court, it is neither compulsory nor proper nor in any way allowable to litigate on the merits of the case or even to carry on an appeal upon the merits.

In *Osborn* vs. *U. S. Bank*, 9 Wheat. 847, the Supreme Court said (by Ch. J. Marshall):

> "A denial of jurisdiction forbids all inquiry "into the nature of the case. It applies to cases "perfectly clear in themselves." * * *

In *Metcalf* vs. *Watertown*, 128 U. S. 587, the Court said:

> * * * "The Court below held the "suit to be barred by the limitation of ten years. "* * * * We are not, however, at liberty to express "any opinion upon the question of limitation, if "the Court whose judgment has been brought "here for review, does not appear from the record "to have had jurisdiction of the case." * *

To the same effect:

Chapman vs. *Barney*, 129 U. S. 682;

Morris vs. *Gilmer*, 129 U. S. 325–6;
Campbell vs. *Porter*, 162 U. S. 482;
Piper vs. *Fordyce*, 119 U. S. 469;
Menard vs. *Goggan*, 121 U. S. 253.

The right to appeal upon the ground that the suit is not within the jurisdiction of the Court, is not made dependent upon the condition that the party shall also take an appeal upon the merits of the case, nor is it reasonable or just to impose such a condition.

Greene vs. *Briggs*, 1 Curtis (C. C.) 325.

(2.) The other answer is that when the jurisdiction of a suit in the Circuit Court is in issue and the defense of want of jurisdiction of the suit is disregarded and final judgment on the merits made in favor of the plaintiff, even if the defendant should attempt to litigate the merits further and therefore should appeal upon the merits to the Circuit Court of Appeals, the Circuit Court of Appeals might certify the question of jurisdiction to the Supreme Court, and suspend all consideration of the case until such question should be appealed to and decided by the Supreme Court. Hence, the appeal would still be to the Supreme Court, and necessarily might be taken much later than the six months within which an attempt to appeal the case to the Circuit Court of Appeals on the merits might be made.

United States vs. *Jahn*, 155 U. S. 114.

We submit that whatever be the time within which a party is of right entitled to file a bill of review for error apparent upon the face of the decree, such error being the want of jurisdiction of the suit, the rule fixing it must be (in the *words* of *Blackstone*) "*a rule* * * * " something permanent, uniform and universal", and that the reasons last above stated demonstrate that such rule is that the bill of review is to be filed "within "the time limited by statute for taking an appeal"and that " the time limited by statute for taking an appeal" is " within two years after the entry of the judg- " ment, decree or order" sought to be reviewed.

It is conceded in the opinion of Judge Hawley shown in the transcript, the opinion given on rendering the decree appealed from—and it is conceded by the appellees—that if the Circuit Court had made in due time a certificate of the question of jurisdiction, the appeal could have been taken at any time within two years after the entry of the decree (—and this seems to have been conceded too by the Supreme Court and may therefore be considered as the law of the case, *Merritt* vs. *Bowdoin College*, 167 U. S. 745; *id.* 169 U. S. 556); and that, therefore, had such been the state of the record, a bill of review might have been of right filed within the same period. It is however, manifest that a certificate of the question of jurisdiction is absolutely immaterial to the right to file a

bill of review. We therefore submit that the reasoning of the Court below, as well as that urged here by the appellees in its support, is self-destructive and only fortifies the conclusion that the time within which the appellants were of right entitled to file their bill of review was "two years after the entry of the * decree" sought to be reviewed.

II.

The Appellate Jurisdiction of This Case by the Circuit Court of Appeals.

On p. 22 of the brief of appellees Stanly and others it is objected as "doubtful if this Court could con- "sider" the question whether the decree (in *Bowdoin College* vs. *Merritt*) sought to be reviewed, shows upon its face the error in law which is the ground upon which the appellants' bill of review seeks relief.

We submit that there exists no such doubt, and that the objection is groundless.

Act of March 3, 1891 (the Circuit Courts of Appeals Act) Secs. 5, 6;
Carey vs. *Houston & Tex. Ry.*, 150 U. S. 180;
Carey vs. *Houston & Tex. Ry.*, 161 U. S. 126.

III.

The Suggestion of Appellees that the Transcript does not Fairly Present the Question of the Error in Law, the Ground of the Bill of Review.

This is urged on pages 14 and 15 of the brief of appellees Stanly et al., and language of the same character is used on p. 12. The language imputes blame to the appellants for printing an insufficient Transcript.

But the Transcript shows on pages 2-15 that the appellants in due time served on the appellees and filed with the Clerk a specification of the errors in law relied on and a designation of the parts of the record deemed material to the consideration of the errors so specified. This was done in compliance with Rule 23 of the Court, which also declares that the appellees, by failing to designate any other part of the record, " shall be held " to have consented to a hearing on the parts desig- " nated by the plaintiff in error or appellant".

Moreover, the appellees do not specify or suggest any particular in which the Transcript is insufficient. We think that no such insufficiency exists.

IV.

The Case of Bowdoin College vs. Merritt Not Within the Jurisdiction of the United States Circuit Court.

Counsel for the trustees have reprinted Judge Hayne's brief, filed in the Circuit Court, in answer to our contention that the case of *Bowdoin College* vs. *Merritt* was not a controversy between citizens of different States, and therefore not within the jurisdiction of the Circuit Court, for the reason that the interests of the trustees, Stanly and Purington, were those of the complainants, and hence that Stanly and Purington should be arranged on the side of the complainants.

We do not think that the learned author of the brief referred to has distinguished the case of a beneficiary of a trust, who has a cause of action against a trustee, or of a stockholder of a corporation, who has a cause of action against the corporation, from the case of a beneficiary or of a stockholder who possesses no cause of action against the trustee or the corporation, but who is permitted by a court of equity to set the judicial machinery in motion, because the trustee or the corporation, who has a cause of action against a third party, refuses to sue.

If there is a wrong done to a corporation, the corpora-

tion, and not its stockholders, has a cause of action. The corporation is, therefore, the party who should bring suit. But if the corporation will not sue, a stockholder may institute an equitable suit, making the wrongdoer and the corporation parties defendant. In such a case, the suit is instituted for the benefit of the corporation. On the other hand, a wrong may be committed by a corporation to a stockholder, and in that event, the stockholder has a cause of action, which he may enforce against the corporation, and, perhaps, against third persons also.

2 Pomeroy's Equity Jur., Secs. 1093–1095.

In the first case, in the determination of the question of the jurisdiction of the United States Circuit Court, the corporation will be arranged as a party to the controversy, on the side of the complainant stockholder, while in the second case, if the parties are really antagonists, no such arrangement can be made.

So, if a wrong is done to a trustee, as, for example, if a claim is made to the trust property by a third person in antagonism to the trust, the cause of action is in the trustee. But if the trustee refuses to sue, a beneficiary may institute a suit in equity to protect the trust property, making the wrongdoer and the trustee parties defendant, and such a suit is instituted for the benefit of the trustee. If, however, a wrong is committed by a trustee against a beneficiary, as by a denial of the rights of the beneficiary under the trust, the beneficiary has a cause of action against the trustee alone, or against the

trustee and others who have co-operated with the trustee in the wrongdoing. In the one case, the interests of the beneficiary and of the trustee being identical, the trustee will, as parties to the controversy, be arranged with the complainant beneficiary, in determining the question of the jurisdiction of the United States Circuit Court to entertain the suit, while in the other case no such arrangement is possible.

In the pioneer case upon the question of arranging parties according to their interests, which, contrary to Judge Hayne's statement, is not the *Removal Cases*, *100 U. S.* 457, but the case of *Commissioners of Arapahoe Co.* vs. *Kansas Pac. Ry.* 4 Dill 277, cited by us in our opening brief, the distinction we are here maintaining, is clearly recognized by Mr. Justice Miller, who wrote the opinion. The suit was one brought by stockholders of the Denver Pacific Railway, citizens of Colorado, to obtain an accounting with the Kansas Pacific Railway, a citizen of Kansas, and other non-resident defendants, who constituted a majority of the directors of the Denver Pacific Railway, on an allegation charging the defendant directors with fraud in depriving the Denver Pacific Railway of funds belonging to it. The suit was, therefore, for a wrong done to the Denver Pacific Railway, and was a suit prosecuted solely for its benefit. It was held that the Denver Pacific Railway was consequently to be arranged on the side of the plaintiffs, and this being so, the controversy was one between citizens of Colorado on one side,

and citizens of other States on the other side, and was properly subject to removal to the Circuit Court of the United States. The learned Justice said, page 285:

> "It is very clear that the interest of the Denver "Pacific Railway Company is the interest of the "plaintiffs; that their interest is identical—that the "Board of County Commissioners are using the "name of the Denver Pacific Company to carry on "this suit solely for the benefit of that company. "The Denver Pacific Company, being in the con- "trol of the defendants, refused to bring this suit, "and the complainants, stockholders of that com- "pany, were of necessity compelled to make it "defendant, that it might be brought before the "Court; but when before the Court, the company "is entitled to recover against the other defend- "ants. The complainants recognize this them- "selves, for in their prayer for relief they say "expressly what they pray for is a decree in favor "of the Denver Pacific Railway Company against "the Kansas Pacific Railway Company and the "other defendants. Now the controversy in this "case is one in which the Commissioners of Arap- "ahoe County and the Denver Pacific Railway "Company are on one side, citizens of the State of "Colorado, against all the other defendants. And "all the other defendants are citizens of other "States, except Sayre and Moffat [nominal defend- "ants], and the controversy, in the language of "the Constitution and of the statutes, is one "between citizens of the State of Colorado, and the "citizens of other States, and therefore within the "meaning of the Constitution of the United "States, and within the meaning of the statute "under which this removal is sought."

The following recent cases, which may be added to those cited by us on page 50 of our opening brief, also

make the distinction:

Rust vs. *Brittle Silver Co.*, 58 Fed. 611;
Shipp vs. *Williams*, 62 Fed. 4;
Board of Trustees vs. *Blair*, 70 Fed. 414;
Consolidated Water Co. vs. *Babcock*, 76 Fed. 243;
Hutton vs. *Joseph Bancroft & Sons Co.*, 77 Fed. 481;
First Nat. Bk, vs. *Radford Trust Co.*, 80 Fed. 569.

The last case cited is particularly instructive. It was a suit by a bondholder of a corporation, praying, among other things, that the mortgage to secure the bonds be foreclosed, and alleging the refusal of the trustees to sue. The complainant was a corporation of the State of Virginia. The defendants were all citizens of the State of Tennessee, or of States other than Virginia. The trustee, Barton, was a citizen of Tennessee. It was contended that Barton, should, for the purposes of jurisdiction, be classed on the same side of the controversy as the complainant, and that when the parties were thus arranged, a cause existed where citizens of Tennessee were upon both sides of the case, and the jurisdiction of the Circuit Court would consequently fail. The Court of Appeals said:

> "If the only object of complainant's bill had been "to foreclose the Barton mortgage, such an aver- "ment as to the reasons moving Barton in his "refusal to institute such a proceeding would be "insufficient to show any real antagonism between "the complainant and himself as trustee, and "would bring the case within the facts of *Rail-* "*road* vs. *Ketchum* [101 U. S. 289], and *Shipp* vs. "*Williams* [62 Fed. 4], elsewhere cited, and

" require that the complainant and Barton should
" be treated as on the same side of the real contro-
" versy, which, in the case supposed, would have
" been a mere question of the foreclosure of the
" mortgage—a controversy wholly with the mort-
" gagor. But complainant's bill, as amended, was
" not a simple foreclosure bill. It was full of
" averments attacking the right of any bene-
" ficiaries thereunder, save itself, to share in the
" benefits of the common security; alleging that,
" with the consent of all other holders of bonds,
" the mortgaged property had been conveyed
" to another newly organized corporation, and
" bonds of this new corporation, secured by a
" mortgage on the same property, accepted in
" exchange for those secured by the convey-
" ance to Barton. These averments involved a
" dispute as to the right of Barton to fore-
" close the mortgage for the benefit of any bene-
" ficiary other than complainant, and involved
" an insistance that if he did not foreclose, or if
" foreclosure should result from judicial proceed-
" ings, the proceeds arising from the sale of the
" mortgaged property should be paid exclusively
" to complainant, to the extent necessary to satisfy
" its bonds. Thus the controversy was not only
" as to the foreclosure of the mortgage, but as to
" the right of complainant to be paid to the exclu-
" sion of all others. Clearly, this was a dispute
" in which Barton, as trustee for all beneficiaries,
" must stand in antagonism to the exclusive claim
" set up by a single beneficiary, and should not be
" treated as upon the same side. The bill was not
" one which could have been properly prosecuted
" by him, and complainant cannot be said to be
" doing just what Barton might have done had he
" been willing to proceed, nor that what complain-
" ant did by filing such a bill was done for the
" trustee and in his behalf."

This rule as to arranging parties is not changed by the mere fact that the trustee or the corporation refuses to sue, where the cause of action is in the trustee or the corporation. Such refusal simply authorizes the beneficiary or the stockholder to act and to institute the suit, but gives him no more right to the jurisdiction of the United States Circuit Court than the trustee himself or the corporation itself would have:

Shipp vs. *Williams*, 62 Fed. 4, 6.

The case of *Bland* vs. *Fleeman*, 29 Fed. 669, one of the authorities cited on page 50 of our opening brief, is said by Judge Hayne to be disapproved in *Belding* vs. *Gaines*, 37 Fed. 817; but the Court will find *Bland* vs. *Fleeman* approved upon the rule as to arranging parties, in the following:

Rich vs. *Bray*, 37 Fed. 273, 279;
Claiborne vs. *Waddell*, 50 Fed. 368, 369;
Cilley vs. *Patten*, 62 Fed. 498, 500.

In a number of the corporation cases cited by Judge Hayne, the objection to the jurisdiction of the Circuit Court was not raised. See the remarks of Mr. Justice Miller in

Hawes vs. *Oakland*, 104 U. S. 450, 459.

We wish to call attention to the close resemblance between the form of the answer in *Hutton* vs. *Joseph Bancroft & Sons Co.*, 77 Fed. 481, and the answer of the trustees Stanly and Purington in *Bowdoin College* vs. *Merritt*.

We therefore submit that in the case of *Bowdoin College* vs. *Merritt*, the trustees Stanly and Purington should have been arranged on the side of the complainant beneficiaries, and when so arranged the Circuit Court had no jurisdiction of the controversy, because the cause was then not a controversy wholly between citizens of one State on the one side and citizens of other States on the other side.

V.

The Contention of Appellees that the Dismissals of the Appeals by the Supreme Court were an Affirmance of the Decree Sought to be Reviewed.

This is also an attempt to shift the defense to a new ground, no such point having been urged in or considered by the Court below. It is now urged on p. 17 of the brief of appellants Stanly et al, and four California decisions and one of Nebraska are cited.

But, whatever may be the law of California or Nebraska, nothing is better settled than that the dismissal of an appeal by the Supreme Court of the United States is not an affirmance of the judgment so as to preclude either an appeal or a bill of review. Upon this point, there is not the least conflict of authority.

In the case of *Bowdoin College* vs. *Merritt*, (in which

the decree was made which this suit seeks to have reviewed) the second appeal was dismissed on the sole ground that the case did not involve the construction or application of the Constitution of the United States. In the decision, the dismissal of the first appeal was expressly mentioned but not assigned as any ground for dismissing the second. It may, then, be fairly claimed as the law of the case, that the dismissal of the first appeal was no bar to the right to take the second and is therefore no bar to a bill of review. And what is true of the dismissal of the first appeal, must needs be true of the dismissal of the second. See *Merritt* vs. *Bowdoin Coll.*, 169 U. S. 556.

In *Colvin* vs. *Jacksonville*, 157 U. S. 368, the appeal was dismissed, on the ground that no certificate of the question of jurisdiction existed and that the case was not appealable. A second appeal was then taken and the appeal heard and decided. *Colvin* vs. *Jacksonville*, 158 U. S. 456.

The Supreme Court has repeatedly decided that the dismissal of one writ of error or appeal is no bar to the right to another writ of error or to another appeal. It of course necessarily follows that such dismissal is no affirmance of the judgment or decree. See

Yeaton vs. *Lenox*, 8 Pet. 123 (by Ch. J. Marshall);
Rice vs. *Minn. & N. W. R. Co.*, 21 How. 82;
Edmondson vs. *Bloomshire*, 74 U. S. 306;
Stewart vs. *Masterson*, 124 U. S. 493;
Evans vs. *State Bank*, 134 U. S. 330.

In *Ensminger* vs. *Powers*, 108 U. S. 302, the appeal was dismissed. Afterward the Circuit Court gave full relief on a bill of review, and this was affirmed by the Supreme Court.

So in *Miller* vs. *Clark*, 52 Fed. 900, the appeal was dismissed, and afterward the Circuit Court gave full relief by the bill of review.

And see *Story Eq. Pl.* §408.

VI.

The Meritorious Right of the Appellants to Obtain the Relief Sought by Their Bill of Review.

The brief of the appellees Stanly et al., searching for new grounds to sustain the decree appealed from, asks the Court (p. 15) "either to dismiss this appeal or to "affirm the judgment of the Court below upon the "ground that it appears affirmatively from the record "that appellants have no standing in court"—(p. 16) "we urge an affirmance of the judgment as to James P. "Merritt, on the ground of his non-interest. He is an "intermeddler in that which does not concern him, and "has vexed the federal courts" etc.—(p. 11). "He "[the appellant Reed] should be turned out of this "Court as James P. Merritt was out of the California "Courts"—(p. 10). "He [James P. Merritt] was turned

" out of Court without a hearing" etc. In page 13 they urge that " the appellants are not entitled to the " slightest consideration beyond what the Court feels " it is compelled to give them upon the legal proposi- " tions involved", and that " every doubtful question " should be construed against them ". On pages 22 and 23 they ask the Court if it shall find that they " are not justified in asking that the complainants be " turned out of Court because not interested", then to decide the merits in their favor and, if it can not do so, then not to decide the merits at all and that " this " Court should be careful to see that its decision " remanding the case cannot be used as the law of the " case " upon the merits and as against them.

These, however, are but illustrations of the pervading character of the brief.

In the case before the Court, the only questions presented for adjudication are questions of law. The only discretion to be exercised is " in discerning the " course prescribed by law ; and, when that is discerned, " it is the duty of the Court to follow it". (*Osborn* vs. *U. S. Bank*, 9 Wheat, 866 by Ch. J. Marshall). What, then, is " the course prescribed by law "?

1.

The Interest that is Sufficient to Maintain the Suit.

These appellants have both been dragged against their will into the Circuit Court of the United States—into a Court having no more jurisdiction of the case than if it were the most obscure court in the most remote corner of the Russian Empire—they have been dragged there and held there against their will by the very appellee who now talks of their having "vexed the "Federal Courts"—they have been laid under judgment to pay the costs of the suit (Tr. p. 228) and have been put under a perpetual injunction depriving them of the fundamental right of a citizen of California to seek redress in her courts.

And what is the error in law upon which the appellants seek relief? Error in law relating to the merits of a controversy may be waived by a party (*Railroad* vs. *Bank*, 135 U. S. 441; *Boston & A. R. R. Co.* vs. *O'Reilly*, 158 U. S. 334). But the error upon which these appellants seek relief is that the decree so made against them, was not only made against their will and by forcibly subduing their proper and most strenuous struggles, but without even so much as the least jurisdiction of the case. It is an error so fundamental and grave that, even if they themselves had brought the suit and had speculated for a judgment on the merits,

and procured the making of the decree, even then, on their application, it would have been the duty of the Circuit Court to set aside any decree upon the merits and dismiss the suit.

Williams vs. *Nottawa*, 104 U. S. 209;
Blacklock vs. *Small*, 127 U. S. 96.

So fundamental and not to be waived is this particular error in law, that as soon as it appears, it is the duty of the Circuit Court to refuse to consider any other question in the case, and to dismiss the suit even if there is no other question in the case, and, hence, to dismiss the suit equally whether the party in whose favor such dismissal is made has or has not any interest to be subserved thereby. If the Circuit Court fails so to dismiss the suit, the appellate court will, on appeal, compel such dismissal.

Osborn vs. *U. S. Bank*, 9 Wheat. 847;
Metcalf vs. *Watertown*, 128 U. S. 587;
Peper vs. *Fordyce*, 119 U. S. 469;
Morris vs. *Gilmer*, 129 U. S. 325–6;
Menard vs. *Goggan*, 121 U. S. 253;
Everhart vs. *Huntsville Coll.*, 120 U. S. 223.

The rule here stated is thoroughly established. The authorities we cite are but a small portion of the long list in which it has been declared and enforced.

In *Osborn* vs. *U. S. Bank*, 9 Wheat. 847, the Court said (by Ch. J. Marshall):

"A denial of jurisdiction forbids all inquiry into

> " the nature of the case. It applies to cases per-
> " fectly clear in themselves." * *

In *Metcalf* vs. *Watertown*, 128 U. S. 587, the Court said:

> "The Court below held the suit to be barred by the
> " limitation of ten years. * * * We are not,
> " however, at liberty to express any opinion upon
> " the question of limitation, if the Court, whose
> " judgment has been brought here for review, does
> " not appear from the record to have had jurisdic-
> " tion of the case."

These quotations express only the settled rule. And it is also thoroughly settled that a bill of review for error in law apparent upon the face of the decree, is the full equivalent of an appeal,—that whatever remedy is to be given by appeal, that also is to be given on the bill of review.

If, then, it were perfectly clear that neither of the appellants had any right whatever to claim the property of the alleged trust, yet from the mere fact that the appellants are parties wrongfully held by the decree sought to be reviewed, the Circuit Court would be bound to give the relief now asked by the bill of review, and, on refusing, might have been by appeal required to give such relief.

Can it be doubted that if the plaintiffs in this bill of review had sought their remedy by appeal, they would have been given by the Supreme Court the relief they now seek, even though they showed no other interest than

that of parties to the suit? And can there, then, be any doubt of their being entitled to the same relief on their bill of review?

But behold the position assumed by the appellees here! They ask that, though the decree sought to be reviewed was made in a suit of which the Circuit Court had no jurisdiction,—that, in the face of this fundamental error, the Circuit Court be directed to adjudicate questions of which it confessedly has no jurisdiction, questions as to the legal rights of the appellants, to adjudicate those questions against the appellants, and upon the ground of such a judgment "that the " complainants be turned out of Court"!

Upon the authorities last cited, as well as upon a clear principle, we submit that the Circuit Court can pursue no such course, but that, since the record shows the absence of jurisdiction, no other question can be adjudicated.

2.

The Confession of the Appellees That the Appellants Are Interested—That the Appellants Are Entitled to Demand, Through the Courts of California, the Property of the Alleged Trust.

If the appellees were sincere in their claim that neither of the appellants has any interest, why are they

defending against the appellants' bill of review?

Why does appellee Stanly urge the Court (p. 14 of his brief) to "understand the painful position occupied "by the trustee while these attacks on the trust are "being made"?

Why does he urge (p. 13) that "the appellants never- "theless prosecute it, thereby inflicting great injury "upon the beneficiaries under the trust"?

Why does he urge (p. 13) that "if this Court listens "to them it delays the closing of the trust" etc.?

There can be but one answer. In these ways, the appellees opposing the suit testify to their conviction that the appellants have something important to gain, and they have something important to lose, in the relief sought by the appellants by their bill of review.

3.

The Interest of the Appellant, George W. Reed, the Administrator.

By the law of California, it is the duty of every administrator to recover, and he "must take into his "possession all the estate of the decedent, real and per- "sonal", and he is authorized to maintain all suits necessary to that end.

C C P. §§353, 1581.

The question who is entitled to the estate is a question for the Superior Court of the State of California sitting in probate. It is not a question for a Circuit Court of the United States to decide in a suit of which it has no jurisdiction.

C. C. P. of Cal. §1664, 1665;
Metcalf vs. *Watertown*, 128 U. S. 587.

The brief of the appellees Stanly and others (p. 11) cites the case of *Field* vs. *Andrade*, 106 Cal. 107 as holding that the administrator has no such duty or right. But the decision in that case was only that, except on behalf of creditors, the administrator cannot recover property which the decedent had conveyed to defraud creditors and which therfore he could not himself have recovered.

The appellants' bill of review states that the administrator has such an action pending in the proper Court of the State of California by which seeks to recover the property covered by the decree in *Bowdoin College* vs. *Merritt*. and that, by the decree here sought to be reviewed, he is prevented from carrying on that suit as required by the duties of his office.

Transcript pp. 274–276.

4.

The Interest of the Appellant James P. Merritt.

The bill of review states that this appellant also, prior to the making of the decree of the Circuit Court complained of, and within due time, had commenced in the proper Court of the State of California a civil action based upon sufficient facts and the due averment thereof, for the recovery of the property covered by the decree sought to be reviewed, and that " he is the " owner of all the said property and entitled to the " possession thereof ", and that by the decree sought to be reviewed he is prevented from prosecuting that action, and " wrongfully damaged in the sum of the value of " the said property". Transcript pp. 274–276.

By their demurrers to the bill, and therefore so far as concerns the case here, this averment of the bill of review is to be taken as true.

But it is urged, in the brief of the appellees Stanly et al., that James P. Merritt can have no possible standing to maintain such an action, because the Superior Court of Alameda county, sitting in Probate, has given judgment that the legal effect of certain contracts stated in this bill in *Bowdoin College* vs. *Merritt*, excluded him from any interest in the estate of Catherine M. Garcelon and hence from the right to contest the validity of

the document admitted to probate as her will, and that this judgment of the Superior Court of the State sitting in Probate, has been affirmed by the Supreme Court of the State.

The decision of the Supreme Court of California referred to may be seen in Vol. 104 of the California Reports at p. 570. The decision rests solely upon the legal effect of the language of the contracts, assuming such contracts to be still in force. The judgment affirmed is exclusively the judgment of the Superior Court sitting in *Probate*.

But the jurisdiction of a Superior Court of California, while sitting in Probate is " a jurisdiction which is sep- " arate and distinct from the jurisdiction of the Court " in ordinary civil actions ".

In re Allgier, 65 Cal. 228;
In re Rose, 80 Cal. 174.

A Superior Court of California, while sitting in Probate, is destitute of any jurisdiction at common law or in equity, except such as is specially entrusted to it by statute.

Andrade vs. *Superior Court*, 75 Cal. 459, 462;
Theller vs. *Such*, 57 Cal. 447;
Bath vs. *Valdez*, 70 Cal. 360;
Barnard vs. *Wilson*, 74 Cal. 517;
Wetzler vs. *Fitch*, 52 Cal. 638.

The contracts of James P. Merritt, the legal effect of which, as the Probate Court held, was to bar him from the right to contest the will, are contracts for the benefit of the appellees, Stanly and Purington, trustees, and, as such, enforceable by them.

Civil Code of Cal., §1559.

And, as may be seen from the report (104 Cal. 578) the Counsel appearing here for the appellee Stanly, also conducted the defense against James P. Merritt in the Probate proceeding.

The rescission or cancellation of such a contract is a remedy belonging to the exclusive jurisdiction of a court of equity.

Pom. Eq. Jur. §§ 171, 188.

And in California such rescission or cancellation is to be had through a civil action, of which the Superior Court in probate has no jurisdiction.

Civil Code, §§ 3406, 3412.

In the Probate Court James P. Merritt was therefore powerless to ask for any rescission or cancellation of the contracts produced against him; the Probate Court was without jurisdiction to grant any such relief. His only remedy was and is by a suit in equity in the Superior Court. In such a suit Stanly, the alleged trustee (appellee here) would be a necessary party. (*Civil Code*, §1559; *C. C. P.*, § 379.) And in such a

suit in equity, the rescission or cancellation of the contracts could be had, the judgment of the Probate Court based upon them set aside, the property covered by the decree in *Bowdoin College* vs. *Merritt* might be recovered, the will set aside, and a full administration of the estate of Catherine M. Garcelon had. That such is the law of California, see

Deck vs. *Gerke*, 12 Cal. 433;
Rosenberg vs. *Frank*, 58 Cal. 401;
Williams vs. *Williams*, 73 Cal. 104.

Is it proper for the Circuit Court of the United States to adjudicate and declare that no facts can possibly exist which will entitle James P. Merritt to such relief, a relief, the propriety of which is to be considered and which is to be granted or denied solely by a Court of equity of the State of California? Is it proper for the United States Circuit Court so to adjudicate, though the suit of *Bowdoin College* vs. *Merritt*, was and is manifestly, undeniably and absolutely not within its jurisdiction? Is not the quesiton one exclusively for the Courts of the State? Are not the suit of *Bowdoin College* vs. *Merritt*, and the defense here made against our bill of review, based upon the very ground that if allowed to apply to the Courts of the State, James P. Merritt might there recover the property covered by the decree in *Bowdoin College* vs. *Merritt?* And since he there might obtain such relief, how can he be justly withheld, by a Court destitute of jurisdiction,

from seeking such relief in the Courts of the State of which he is a citizen?

As to the declaration of appellees Stanly and others (p. 10) that in the Probate Court James P. Merritt "was turned out of Court without a hearing", etc., and that he should be treated on the same principle here, and that the other appellant (p. 11) "should be "turned out of this Court as James P. Merritt was out of the California Courts", and that no decision upon the merits should be made unless it be made against the appellants,—to such demands of the appellees, the language of Justice Field in *Wong Wing* vs. *United States*, 162 U. S. 142-3, is as applicable as it was in that case. Justice Field there said:

"The contention that persons within the territorial "jurisdiction of this republic might be beyond the pro- "tection of the law, was heard with pain on the argu- "ment at the bar, in face of the great constitutional "amendment that no state shall deny to any person the "equal protection of the laws. Far nobler was the boast "of the great French Cardinal who exercised power in "the public affairs of France for years, that never in "all his time did he deny justice to any one. 'For fif- "'teen years', such were his words, 'while in these "'hands dwelt empire, the humblest craftsman, the "'obscurest vassal, the very lepers shrinking from the

" 'sun, though loathed by charity, might ask for
" 'justice'."

We respectfully ask that the decree appealed from be reversed.

RODGERS, PATERSON & SLACK,
Counsel for Appellants.

Feb. 21, 1899.